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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 5791

ALL-STATE INDUSTRIES OF NORTH CAROLINA, INC., ET AL.,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The petitioners, All-State Industries of North Carolina, Inc., ABC Storm Window Co., Inc., All-State Industries of Tennessee, Inc., All-State Industries of Illinois, Inc., corporation, and William B. Starr, individually and as an officer of said corporations, pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit which ordered enforcement against all respondents of the order entered against all respondents by the Federal Trade Commission.

OPINIONS BELOW

The Federal Trade Commission issued a cease and desist order against all petitioners on April 1, 1969. This order was appealed to the United States Court of Appeals for the Fourth Circuit which ordered the enforcement of the order of the Federal Trade Commission by its opinion dated March 19, 1970. The opinion is set out at Appendix A. The decree of the Court of Appeals dated April 13, 1970 enforcing the order of the Federal Trade Commission is set forth at Appendix B.

JURISDICTION

The decree of the Court of Appeals was entered April 13, 1970. Appendix p. B-1. The jurisdiction of this Court is invoked under Title 28, United States Code, Sec. 1254.

QUESTIONS PRESENTED

1. Did the Circuit Court below err in refusing to rule that the Federal Trade Commission should be disqualified from ruling as a judicial body where there was evidence that the Commission had prejudged the matters submitted to it for adjudication.

2. Did the Circuit Court below err in ordering enforcement of an order of the Federal Trade Commission which will require respondents to advise its customers of the legal consequences of the holder in due course concept, where there was no evidence adduced that any customer of the respondents had ever been misled or injured by a failure to so advise.

STATUTE INVOLVED

Federal Trade Commission Act: Unfair Methods of Competition Unlawful; * * * § 45(a)(1) Unfair Methods of Com-

petition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

STATEMENT

The Federal Trade Commission brought a complaint against the petitioners pursuant to Section 5 of the Federal Trade Commission Act, § 15 U.S.C. 45. The complaint alleged that petitioners engaged in unfair methods of competition and unfair and deceptive acts and practices in advertising and selling home improvement products. While the matter was pending before the Federal Trade Commission, respondents moved to dismiss the complaint on the ground that the Federal Trade Commission was disqualified from performing a judicial function in this case because of an alleged prejudgment of the guilt of the respondents. The motion was based upon a letter dated November 28, 1967, directed to the Honorable Warren Magnuson, a member of the United States Senate. The letter is reproduced at Appendix C. The letter was signed by the then chairman of the Federal Trade Commission, Paul Rand Dixon, who was speaking for the Commission and the letter was made public by the Federal Trade Commission. By written opinion, dated March 18, 1968, the Federal Trade Commission denied petitioners' motion to disqualify. (R. Vol. I, pp. 27-33) Thereafter testimony in support of the complaint was offered before a hearing examiner. At the conclusion of the hearings the hearing examiner rendered his written opinion on August 14, 1968 in the form of an initial decision. (R. Vol. I, p. 117) The Commission rendered its final order on April 1, 1969. (R. Vol. I, p. 138)

The final order of the Commission reversed that portion of the hearing examiner's initial decision wherein he held that the evidence produced before him did not warrant a cease and desist order requiring respondents to make disclosures concerning the possible implications of the transfer of conditional sales contracts, promissory notes or

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other instruments of indebtedness executed by consumers. The hearing examiner, in his initial decision found that no evidence was produced to prove that any customer of respondents had been misled or injured by a failure to advise purchasers about the implications of the transfer of conditional sales contracts, promissory notes or other instruments of indebtedness.

The respondents petitioned for a review of the order of the Federal Trade Commission by the United States Court of Appeals for the Fourth Circuit. The opinion of the circuit court below endorses the action of the Federal Trade Commission and entered a judgment enforcing the cease and desist order. (Appendix A)

REASONS FOR GRANTING THE WRIT

I. THE CIRCUIT COURT BELOW ERRED IN FAILING TO RULE AS THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA RULED IN AN ANALAGOUS SITUATION THAT COMMISSIONERS HAVE NO LICENSE TO PRE-JUDGE CASES OR MAKE COMMENTS WHICH GIVE THE APPEARANCE OF PRE-JUDGMENT.

The Circuit Court below brushed aside the respondents' contention that the Commission was disqualified from sitting as a judicial body because of its pre-judgment. The Circuit Court cited as one of its authorities *FTC v. Cinderella Career and Finishing Schools, Inc.*, 404 F.2d 1308 (DC Cir. 1968). In the cited *Cinderella* opinion the issue before the United States Court of Appeals for the District of Columbia was whether the Federal Trade Commission had the right to issue press releases notifying the public of its action in the bringing of a complaint. The court ruled that the Federal Trade Commission had such a right. However, *Cinderella* was before the United States Court of Appeals for the District of Columbia a second time on the issue of pre-judgment by a Commissioner of a matter pending before the Commis-

sion. The opinion dealing with the pre-judgment issue was filed on March 20, 1970,[1] one day after the opinion of the Fourth Circuit Court below. The second *Cinderella* opinion distinguished the issuing of a press release from remarks indicating a pre-judgment by the then Chairman of the Federal Trade Commission, Paul Rand Dixon. The court criticized the action of the then Chairman and reversed the action of the Federal Trade Commission as being tainted by pre-judgment.

In the present case the pre-judgment took place by way of the letter of the then Chairman, Paul Rand Dixon, to the Honorable Warren G. Magnuson (Appendix C). This letter sets forth in detail a paraphrase of the allegations charged in the complaint filed against respondents. Page 2 of the letter stated:

> "Generally speaking, these firms operate through a program offering phony bargains, easy credit and exaggerated performance claims." (Appendix C, page C-2)

On Page 6 of the letter is the statement that two cases are "presently being litigated." (Appendix C, page C-6) The case against respondents was pending at the time the letter was released so it is fair to conclude that it was one of the cases referred to in the letter.

The Circuit Court below disposed of the pre-judgment issue by saying:

> "The argument is superficial." (Appendix A, page A-2)

This places the Circuit Court below in conflict with the decision of the United States Court of Appeals for the District of Columbia Circuit in *Cinderella, supra*.

In *Cinderella, supra*, Chairman Dixon made a speech before the Government Relations Workshop of a national

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[1] *Cinderella Career and Finishing Schools, Inc., et al v. Federal Trade Commission*, United States Court of Appeals for the District of Columbia. No. 22,624. Reprinted as Appendix D.

newspaper association in which he referred to a pending case. The court held that such references were improper.

Respondents contend that the opinions of the Fourth Circuit below and of the United States Court of Appeals for the District of Columbia do manifest a conflict on the pre-judgment issue. This disparity will stimulate forum shopping by litigants and will place Commissioners in a state of confusion as to the standard which is to be applied to their comments about matters pending before an agency.

II. THE CIRCUIT COURT BELOW ERRED IN ORDERING ENFORCEMENT OF AN ORDER OF THE FEDERAL TRADE COMMISSION REQUIRING RESPONDENTS TO INFORM CUSTOMERS OF THE LEGAL CONSEQUENCES OF THE HOLDER IN DUE COURSE CONCEPT WHERE THERE WAS NO EVIDENCE ADDUCED THAT ANY CUSTOMER OF THE RESPONDENTS HAD BEEN MISLED OR INJURED BY A FAILURE TO SO ADVISE.

There was no testimony adduced before the Commission that any customer of the respondents was deceived in any manner with respect to a failure to disclose to customers that documents of indebtedness executed in connection with sales may be assigned to a third party to whom the purchasers claims or defenses on the contract may not be available. This case is the first challenge before the Courts of the action of the Commission in its attempt to legislate this burden on traders. This is a usurpation of the power of the legislature. Assuming that such action could be taken, it should be taken only after there is evidence of injury to the customers of these petitioners. The Circuit Court below characterized the requirement as one of "severity" and justified the Commission's action in the negative:

> "It was within the Commission's domain and cannot be said to be unsupported in the record." (Appendix A, p. A-5)

This court should reverse the circuit court below wherein it ordered enforcement of this order.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX A

All-State Industries of North Carolina, Inc.,
ABC Storm Window Co., Inc.,
All-State Industries of Tennessee, Inc.,
All-State Industries, Inc., and
All-State Industries of Illinois, Inc.,
corporations, and William B. Starr,
individually and as an officer of said
corporations,

Petitioners,

v.

Federal Trade Commission,

Respondent.

On Petition to Review and Set Aside Portions of an Order of The Federal Trade Commission.

(Argued January 6, 1970 Decided March 19, 1970.)

Before Haynsworth, Chief Judge, and Sobeloff and Bryan, Circuit Judges.

Jacob A. Stein (Joseph J. Lyman on brief) for Petitioners and Robert E. Duncan, Attorney, Federal Trade Commission, (John V. Buffington, General Counsel, J.B. Truly, Assistant General Counsel, and Alvin L. Berman, Attorney, Federal Trade Commission, on brief) for Respondent.

Albert V. Bryan, Circuit Judge:

The Federal Trade Commission on June 19, 1967 complained in due form of unfair and deceptive acts and practices by All-State Industries of North Carolina, its four affiliates and principal executive officer (All-State). Federal Trade Commission Act, section 5(b), 15 USC 45(b). Upon

the accused's responsive denial of the charges and after a plenary administrative hearing, the Commission declared the complaint justified and ordered desistance and cessation of the imposture. Respondents appeal, but we perceive no infirmity in the order.

I. At the start, respondents moved to disqualify the Commission on the grounds that prior to the initiation of this proceeding, its Chairman had written the United States Senate Committee on Commerce decrying the prevalence of practices in national trade paralleling those of All-State. The respondents branded the communication a pre-judgment of their cause, obliging the Commissioners to recuse themselves.

The argument is superficial. The Commission was performing its overriding duty under the Act to investigate appearances and apprehensions of activities hurtful to the economy of the country. It was incumbent upon this body to speak out, as it did, upon commercial behavior thought to be of overtopping importance because of its apparently deceiving character and potential expansion. *FTC v. Cinderella Career and Finishing Schools, Inc.*, 404 F.2d 1308, 1313-14 (DC Cir. 1968). Cf. *Lehigh Portland Cement Co. v. FTC*, 291 FS 628 (EDVa. 1968; Lewis, J.), aff'd per curiam, ___ F.2d ___ (4 Cir. 1969).

II. The respondent companies engage in the interstate sale and installation of residential aluminum siding, storm windows, doors, and appurtenant fixtures. From the Hearing Examiner's findings of fact, the following account unfolds of how they vend their products. These are of two grades. The "ADV" is the cheaper. It is extensively advertised, primarily through mail-outs to people whose names and addresses are culled from telephone directories. "PRO", the other grade, is of a higher quality and not so widely publicized.

Respondents' sales technique, or "pitch", is devised to create, first, a demand for the "ADV" product. Through inflated promotion it is presented as a "special offer" with "limited time" prices. But the Examiner found the "ADV"

is actually priced uniformly and without time limit. He held as untrue All-State's claim that they deal directly from their factory with the output "100% guaranteed".

Inquiries or "leads" are answered by a supposed "sales manager". He attempts to pressure the prospect into signing a contract, a note and a deed, committing him to the purchase of "ADV" articles but leaving blank the monetary obligation. As soon as the contract is executed, the salesperson brings out a sample of the "ADV" and points out deficiencies in it, "whether real or imaginary". The "PRO" is then shown in contrast, to the detriment of the "ADV". Wherever possible the "PRO" is then sold "at the highest price obtainable from the individual customer". The salesmen have incentives to substitute the "PRO"—they receive no commission on "ADV" but only on "PRO" sales.

This "bait and switch" artifice, the Examiner discovered, was fully set forth in the sales force's training manual and was employed generally. He also reported that All-State's agents utilized "gimmicks whereby the original prices quoted for respondents products can be reduced." For example, the representative would promise a potential buyer a special discount, even below the quoted sale price, if the latter would allow the use of his home for demonstration or display purposes. Rarely, however, would a patron's home be so utilized. It was found as a bare inducement to overcome "sales resistence at a higher price" and provide "some apparently reasonable basis for the reduction in price."

These findings of the Examiner were embraced by the Commission as securely rooted in the evidence. Clearly they sustain the complaint.

III. The Commission's final order contained thirteen "cease and desist" directives against continuance of the practices inveighed against by the Examiner. This suit attacks these mandates as too broad, too general and vague. Appellants' criticisms are untenable. The Commission's precepts are unequivocally phrased and necessary inhibitions upon the appellants' future pursuit of business.

The only directive warranting further discussion is No. 13. Refused by the Examiner, but added by the Commission, it requires the respondents to refrain from:

> "13. Failing to disclose orally prior to the time of sale, and in writing on any conditional sales contract, promissory note or other instrument of indebtedness executed by a purchaser, and with such conspicuousness and clarity as is likely to be observed and read by such purchaser, that:
>
> "Any such instrument, at respondents' option and without notice to the purchaser, may be discounted, negotiated or assigned to a finance company or other third party to whom the purchaser will thereafter be indebted and against whom the purchaser's claims or defenses may not be available."

This prescript is best explained in the words of the Commission's opinion:

> "We hold that the examiner erred in dismissing this charge of the complaint. Our holding is based upon two grounds discussed in detail below: first, that failure to disclose to prospective purchasers that notes of indebtedness executed in connection with a retail sale may be assigned to third parties to whom the purchaser's claims or defenses on the contract may not be available is inherently unfair where, as here, the seller routinely assigns such instruments to third parties; and second, that such failure to disclose is deceptive in view of facts officially noticed by the Commission."

This directive is sustained. Factually, it rests on the Commission's quite sound anticipation that All-State's deceptions would engender customers' complaints generally. Warrantably, it foresaw purchasers soon seeking to recoup their losses through set-offs or counterclaims against the obligations they had delivered to All-State. Possibility of their success would, of course, be foiled or obstructed by negotiation of the obligations. Despite its severity the Commission thought the directive was a needed public precaution.

This determination was peculiarly justifiable here because of the nature and prevalence of All-State's deceptions. It was within the Commission's domain and cannot be said to be unsupported in the record. Cf. Section 5(c) of the Federal Trade Commission Act, 15 USC 45(c).

The order on appeal will be enforced against all of the respondents, individual as well as corporate.

Affirmed

APPENDIX B

All-State Industries of North Carolina, Inc.,
ABC Storm Window Co., Inc.,
All-State Industries of Tennessee, Inc.,
All-State Industries, Inc., and
All-State Industries of Illinois, Inc.,
corporations; and William B. Starr,
individually and as an officer of said
corporations,

Petitioners,

vs.

Federal Trade Commission,

Respondent.

On Petition to Review and Set Aside Portions of an Order of the Federal Trade Commission.

THIS CAUSE came on to be heard on the petition of All-State Industries of North Carolina, et. al., to review and set aside portions of an order of the Federal Trade Commission issued April 1, 1969, in proceedings before the Federal Trade Commission and known upon its records as Docket No. 8738, and on the certified list in lieu of a transcript of the record filed in this Court, and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit that the said portions of the order of the Federal Trade Commission be, and they are hereby enforced against all of the respondents, individual as well as corporate, in accordance with the opinion of the Court filed herein.

FILED
April 13, 1970
Samuel W. Philips
Clerk

/s/ Samuel W. Phillips
Clerk

APPENDIX C

Honorable Warren G. Magnuson,
Chairman,
Committee on Commerce,
United States Senate,
Washington, D.C. 20510

Dear Mr. Chairman:

This is in further reply to your letter of October 10, 1967 requesting an outline of the Commission's current program in the area of home improvement frauds together with suggestions for additional legislation to improve the enforcement program in this field.

The home improvement industry is vast and complex. The April, 1966 issue of the *Building Supply News*, a leading trade magazine, estimated that the current home improvement market is about 15 billion dollars annually. According to other presumably reliable sources the alterations and repairs of homes represent about 20-25% of the national spending on residential buildings. In this industry there are many product lines, manufactured, distributed and merchandised by thousands of individual firms at different levels of competition. Some of these are siding, storm windows, recreation rooms, kitchen fixtures, air conditioning systems, pools, intercoms, central vacuum systems, awnings, gutters, lightning rods, etc. It's a big industry and rapidly growing bigger. The growth of this industry has been further accelerated by the recent shortage of mortgage money and the sag in new home constructions.

From presently available published data, it is impossible to state accurately the number of firms engaged in the sale and installation of home improvements. The Bureau of Census reports that there are 285,000 contractors engaged in the building construction industry, of which 194,000 are special trade contractors. The latter are the type of firms which would be primarily engaged in the installation of home improvements.

An official of a large lending institution has estimated that there are over 50,000 firms engaged in the sale and installation of residential siding and storm windows.

The industry can be subdivided into four separate levels of competition. These are: 1. The producers of raw materials such as U.S. Steel, Alcoa, Reynolds, Monsanto, etc. 2. The producers sell their products to a large number of firms engaged in the fabrication and processing of various items used by the home improvement industry. These firms purchase the unfinished aluminum, steel, etc. from a manufacturer and convert it into a finished end product. 3. The fabricators generally sell their finished products to hundreds of building supply distributors located throughout the United States. 4. Distributors in turn sell home improvement products to local retailers, or building contractors.

In many cases the contractors (local retailers) are "fly-by-night" operators with minimal assets and gross annual sales in the millions. Generally speaking, these firms operate through a program of offering phony bargains, easy credit and exaggerated performance claims.

The operational patterns of the unethical firms in this industry defy any neat categorization of deceptive or unfair trade practices. They repeatedly change their method of operation to meet increased consumer resistance or governmental restriction. However, many techniques have become almost standardized. The fringe operators are out for the quick dollar and are without concern when it comes to squeezing the last possible dime out of their victims. Their arsenal of sales techniques include:

1. Fictitious and inflated prices from which the home owner is promised a substantial discount, but who actually ends up paying far more than a fair market price, as charged by ethical contractors.

2. The Model Home Sales Pitch—The home owner is offered a phony "special discount", "reduced price" or phantom commission for the use of his home for display or advertising purposes.

3. "Special" factory deals or wholesale prices which are neither "factory" nor "special", but which are actually overpriced.

4. Bait and Switch Tactics—Services or products are advertised at ridiculously low prices and then later disparaged in order to switch the purchaser to a highly overpriced item or service.

5. Bogus Contests—A so-called "lucky winner" is offered fictitious discounts in a rigged contest with the purchase of the product or service offered for sale.

6. Phony bargains are often disguised by salesmen posing as "a representative of a well known manufacturer".

7. Misrepresentations of guarantees—"Unconditionally guarranteed for 20 years" when there are conditions, limitations and restrictions which in fact render the "guarantee" worthless.

8. Misrepresentation of product efficacy, durability, performance, etc.—such as "never needs repainting", "save 20% on fuel bills", "won't chip, crack or peel", etc.

9. Scare tactics to lead the consumer to believe that because of some defect in his home the lives of his family and himself are in danger if the product or services are not purchased.

10. Referral Selling—The consumer is misled into believing that he can pay for all or part of the service or product through commissions gained from sales to his neighbors or friends.

11. Fraudulent misrepresentations in which the salesman promises one product or services, while the contract calls for another.

12. "Spiking the job"—where, within hours after signing, the home improvement racketeer initiates a minimum, token performance and then badgers the purchaser into believing that there is partial performance which makes the contract non-cancelable. It is frequently weeks and may be

months before the job is completed at the convenience of the gyp operator.

13. Affirmative misrepresentations in connection with loan transactions—Sales of home improvement products are made on the representation of "buy now and pay later", coupled with an offer to consolidate all outstanding bills of the prospective purchaser. The deceptive practices include such things as actual misrepresentations as to the interest rates and finance charges; signatures obtained upon blank completion certificates before the work is completed and on blank contracts which are later loaded with unauthorized charges; and enticing home owners into executing first or second mortgages without their knowledge, or by subterfuge or misstatement.

14. In some cases the unethical operator employs such practices to obtain the signature of a home owner to a bogus home improvement contract through misleading statements and the procurement of signatures to blank contracts. He immediately sells the obligation to a finance institution who interposes the defense of a bona fide holder in due course, thus cutting off most defenses the victim might have against the seller.

Although we realize that consumer credit has become an intergral part of our way of life and represents a means by which most Americans acquire, use and enjoy essential goods and services, it is believed that the manner in which the racketeering home improvement operator employs his offer of "easy credit" is a part of the scheme by which consumer frauds are perpetrated upon untold thousands of American consumers.

While the great majority of the abuses outlined above are worked against the uneducated, the unsophisticated and the poor, no one is immune from the glib salesman or unethical operator who urges the prospective buyer to sign a contract, which is often printed in small type, difficult to read and deliberately confusing.

I believe the objective of any program of the Federal Trade Commission in the home improvement field should be to put the consumer on an equal footing with the seller by requiring the vendor to provide the consumer with reliable, truthful information which will allow him to make an intelligent evaluation of the transaction and thus to protect him from the above described deceptive, illegal and unconscionable practices.

The home improvement situation is one of those in which the ultimate enjoining of fraudulent practices is not an adequate deterrent to the unethical operator.

It is my opinion that the consumer today is faced by deceptions deserving a degree of protection from fraudulent, intentional violations of Section 5 of the Act, without regard to the type of commodity, comparable to those practices prevailing in food, drug, device and cosmetic advertising which impelled Congress in 1938 to enact Sections 13 and 14.

Section 13 now provides that the Commission may bring suit, when it would serve the public interest, in a Federal Court enjoining the dissemination of a false advertisement for a food, drug, device or cosmetic pending final disposition of a Commission complaint. Section 14 declares any false advertisement for such products, if disseminated with intent to defraud or mislead, to be a misdemeanor punishable by a fine of not more than $5,000 or by imprisonment for not more than six months, or both.

It is unthinkable that in these enlightened times a fraudulent operator can continue his vicious practices while his "rights" are being protected in the course of prolonged litigation. The Commission should be authorized to go to a Federal Court seeking a preliminary injunction, when in the public interest, to accord to the consumer the "right" at least to be protected from illegal practices while the operator delays issuance of a final order by insisting upon his full procedural rights.

Similarly, those practices in the home improvement field, as in others, when engaged in with intent to defraud or mislead, are equally as vicious as the false advertising of food, drugs, devices and cosmetics, and should be declared misdemeanors.

A major problem in this area is a lack of manpower and funds to undertake the extensive and aggressive program required to deal adequately with the sheer magnitude and complexity of the consumer problems in this area and to afford competitive protection to the thousands of honest firms in this industry. Our staff informs me that over the past three years our annual expenditure on the home improvement project has been approximately $30,000 (two man years).

In the past three years the staff has opened 75 field investigations of home improvement operations. During this time 9 orders and 5 assurances of voluntary compliance have been obtained. These are:

Formal	Docket No.
1. Interstate Builders, et al., Cincinnati, Ohio.	8624
2. Gulfcoast Aluminum Supply Company, et al., Tampa, Florida.	8662
3. Royal Construction Company, et al., Greensboro, North Carolina.	8690
4. Cast-o-Brick, et al., St. Louis, Missouri.	C-1098
5. Modern Builders, Inc., et al., Winter Park, Florida.	C-1130
6. First Federal Construction Company, et al., Evansville, Indiana.	C-1181

7. Youngstown Awning and Window Company, et al., Creve Coeur, Missouri. C-1142
8. Republic Construction Company, et al., Fern Park, Florida. C-1164
9. The National Aluminum Company, et al., Columbia, South Carolina. C-1076

Assurance of Voluntary Compliance

1. Ambrico, et al., Toledo, Ohio. File No. 662 3065
2. Dietz Home Improvement, et al., Alton, Illinois. " " 662 3116
3. Seaman Andwall, et al., Ixonia, Wisconsin. " " 662 3339
4. Lumaside, Inc., et al., Milwaukee, Wisconsin. " " 662 3362
5. Mastic Corporation, et al., South Bend, Indiana. " " 672 3080

The time lag between opening an investigation and obtaining an order for both consent orders and voluntary compliance matters has been approximately one year. In the three litigated cases the time lag has been approximately four years. This is precisely the time lag during which the consumer is entitled to the protection which would be afforded by amending Section 13.

Currently we have approximately 45 home improvement cases under active investigation. Two additional complaints are presently being litigated. The staff has further advised me that they are now in the process of preparing 12 additional matters in which they will recommend the issuance of complaints against home improvement companies.

Due to major manpower commitments to the packaging and cigarette programs, the District of Columbia Consumer

Protection project, the automobile warranty and softwood lumber inquiries, bait-and-switch practices in the sale of frozen food and other promotions, the insurance investigation, and many other efforts reflecting a high degree of public interest, I can give you no assurance that additional personnel can be assigned to attack this swelling workload promptly.

Including all types of corrective action the companies involved in this enforcement program for the past three years operated in all 48 states of the continental United States.

Depending upon the facts of each individual case our orders and other corrective action generally cover the practices outlined above.

In addition to the activities in our Bureau of Deceptive Practices, the Bureau of Industry Guidance in administering the guides for the "Residential Aluminum Siding Industry", "Guarantees", "Pricing" and "Shell Homes", is constantly attempting to obtain voluntary compliance by various members of the home improvement industry with the Commission's Guides.

Recently, several states have passed legislation to control unfair and deceptive practices such as those involved in the sale of home improvement products. Our staff has on occasion met with officials from some of these states to exchange ideas and information for the purpose of obtaining more effective enforcement at both Federal and state levels.

In the past year, we have forwarded a number of matters in which the local home improvement retailer is not engaged in interstate commerce to various state officials for appropriate action. We expect to continue this practice in the future.

Our Assistant General Counsel for Federal-State Cooperation has devoted much of his time to encouraging various states to enact laws and proceed against unfair and deceptive practices at the state level.

Precision in identifying members in this industry is difficult, as there is no reliable published information available on firms engaged in various functional levels of competition in the home improvement industry. Sufficient funds are not presently available for the assignment of personnel to pursue a thorough industry-wide instructional study of the home improvement industry.

A brief outline of such study would include:

A. The Home Improvement Industry.

1. Products involved.
2. Size of individual product markets.
3. Number, location and size of retail firms and an identification of their behavioral patterns.
4. Fabricators and suppliers of home improvement products together with a delineation of their relationship with individual home improvement retailers.
5. Producers of raw products and their relationship with suppliers and individual retailers.
6. Financing of home improvements and the relationship between the finance companies and individual retailers.

B. Remedial action.

1. By Congress.
2. By the Federal Trade Commission.
3. Action by other Federal agencies.
4. By state and local agencies.
5. By industry.

I would estimate that such a study, (apart from regulatory action) would require the time of a ten-man task force for approximately a year to serve as a basis for the multiple purposes indicated.

Essential to truly effective remedial action in this field, if adequate personnel were available, would be the issuance of investigational subpoenas against certain of the leading finance institutions engaged primarily in purchasing home improvement paper, and field investigations against others, to determine the actual involvement of the financing organizations.

The false, fraudulent and deceptive practices described above, continue to increase due to the exorbitant finance charges which makes ample easy credit available and encourages quick entry into this market with minimal assets. Furthermore, these fraudulent practices are carried on with impunity because of the immediate transfer of the negotiable instruments to the finance companies who claim the defense of a bona fide holder in due course, thereby stripping the victim of meritorious defenses. The Commission's staff believes it could be demonstrated that leading companies specializing in home improvement loans are not always innocent holders and should be prohibited from asserting this defense. Fragmentary but persuasive information raises the expectation that in some cases the staff may be able to develop facts which would demonstrate that certain finance companies have actually participated with selected home improvement retailers in obtaining contracts based on fraud and misrepresentations. Should the facts bear out the suppositions of our staff, such companies should not only be prevented from asserting the innocent holder defense, but should also be put under the same prohibitions as the retailer.

Our staff believes that such a program would foreclose substantial consumer credit which is presently being utilized by the home improvement racketeers, who cannot stand alone, to sustain their programs of unethical competitive conduct.

Our staff also advises me that they have reason to believe that many of the producers and fabricators of home improvement products may be placing in the hands of the

home improvement swindlers certain sales promotional material which is so employed as to assist them in the consummation of home improvement frauds. There is also strong objective evidence that certain of the producers and fabricators may be operating finance branches in the manner described above. It is the opinion of our staff that in this area they may be able to develop facts which could be the basis for orders against these firms which would do much to eliminate consumer frauds in the home improvement market.

Under an accelerated program the staff would simultaneously attempt to increase the case-by-case approach at the retail level, and would also continue and expand, to whatever limits appeared profitable, our voluntary compliance work, our state cooperation efforts and our consumer education program.

One important factor, constantly in my mind, is that while much of our effort is in the interest of the consumer, the great majority of honest, reliable home constractors in this country are equally deserving of this protection.

It is obvious that the present assignment of two attorneys cannot be expected to keep abreast even of the increasing flow of litigation against individual operators.

Recapitulating,

1. Section 13 of the Federal Trade Commission Act authorizing petition for an injunction to prevent false advertising of foods, drugs, devices and cosmetics should be amended so as to extend to the enjoining of any charge of violating Section 5.
2. Section 14 should be amended so as to provide that any practice in violation of Section 5, if with intent to defraud or mislead, constitutes a misdemeanor.
3. No other legislative authority would be required to enable the Federal Trade Commission to carry out the type of enforcement program outlined above if it were provided with adequate additional funds for

necessary personnel and other expenses. It is estimated that 25 attorneys would be required for a period of three years to cope adequately with this nationwide problem of consumer deception.

Sincerely yours,

/s/ Paul Rand Dixon,
Chairman.

APPENDIX D

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,624

CINDERELLA CAREER AND FINISHING SCHOOLS, INC., STEPHEN CORPORATION, VINCENT MELZAC, PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

Petition for Review of an Order
of the Federal Trade Commission

Decided March 20, 1970

Mr. Alan Y. Cole, with whom *Messrs. Isaac N. Groner* and *William Kanter* were on the brief, for petitioners.

Mr. Gerald Harwood, Attorney, Federal Trade Commission, with whom *Mr. Karl H. Buschmann*, Attorney, Federal Trade Commission, was on the brief, for respondent.

Before TAMM, MACKINNON and ROBB, *Circuit Judges*.

TAMM, *Circuit Judge*: This is a petition to review orders of the Federal Trade Commission which required petitioners Cinderella Career College and Finishing Schools, Inc. (hereinafter Cinderella), Stephen Corporation (the corporate entity which operates Cinderella), and Vincent Melzac (the sole owner of the stock of Cinderella and Stephen Corporation), to cease and desist from engaging

in certain practices which were allegedly unfair and deceptive.[1]

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[1] The Commission's complaint alleged that advertising used by petitioners contained the following false representations:

1. Petitioners make educational loans to students who register for courses at the Cinderella Career and Finishing School.

2. School Services, Inc. is a government or public nonprofit organization that has officially approved the Cinderella School or its courses.

3. Dianna Batts, "Miss U.S.A. 1965," and Carol Ness, "Miss Cinderella 1965," were graduates of the Cinderella School and owe their success to the courses they took there.

4. and 5. Petitioners offer courses of instruction which qualify students to become airline stewardesses and buyers for retail stores.

6. Petitioners find jobs for their students in almost all cases through their job placement service.

7. Graduates of petitioners' courses are qualified to assume executive positions.

8. Cinderella Career and Finishing School is the official Washington, D.C., headquarters for the Miss Universe Beauty Pageant.

9. Cinderella Career College and Finishing School is a college.

The complaint also alleged that the following practices were deceptive:

10. Prospective students who visit petitioners' school are frequently led to believe that they will be qualified to compete in certain beauty contests if they sign up for courses.

11. Petitioners frequently add that completion of their courses will enable applicants in most cases to obtain better jobs.

12. Prospective students are subjected to constant pressure to persuade them to enroll in petitioners' courses.

13. Petitioners fail to disclose the nature of the commitments the students are expected to assume or to provide

After the Commission filed its complaint under section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1964), which charged Cinderella with making representations and advertising in a manner which was false, misleading and deceptive, a hearing examiner held a lengthy series of hearings which consumed a total of sixteen days; these proceedings are reported in 1,810 pages of transcript. After the Commission had called twenty-nine witnesses and the petitioners twenty-three, and after the FTC had introduced 157 exhibits and petitioners 90 (Petitioners' Brief at 7), the hearing examiner ruled in a ninety-three page initial decision that the charges in the complaint should be dismissed.[2]

Complaint counsel appealed the hearing examiner's initial decision to the full Commission; oral argument was heard on the appeal on May 28, 1968 (Opinion of the Commission at 2), and the Commission's final order was issued on October 10, 1968. The full Commission reversed the hearing examiner as to six of the original thirteen charges and entered a cease and desist order against the petitioners, who then brought this appeal. For the reasons which follow we remand to the Commission for further proceedings.

We are faced with two principal issues on this appeal:

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them with sufficient time or opportunity to read and consider them.

(App. 5-7.)

[2] The hearing examiner concluded that:

> Complaint counsel had failed to prove by a preponderance of reliable, probative and substantial evidence that the acts and practices alleged in the complaint to be deceptive, or any of such acts and practices, did and do constitute deceptive acts and practices which are proscribed by the Federal Trade Commission Act.

(Initial Decision at 93.)

whether the action of the Commission in reversing the hearing examiner comports with standards of due process, and whether then Chairman Paul Rand Dixon should have recused himself from participation in the review of the initial decision due to public statements he had previously made which allegedly indicated pre-judgment of the case on his part.

I. Procedural Irregularity and Due Process

As we have indicated above, the hearing on the complaint against petitioners was exhaustive. The important question raised by petitioners here is whether the full Commission, in reviewing an initial decision, may consider the advertisements de novo, disregarding entirely the evidence adduced at a lengthy hearing, and arrive at independent findings of fact and conclusions of law, or whether the Commission is bound by its own rules and regulations, as well as concepts of due process, to review the conclusions of the hearing examiner in light of the evidence.

In their final decision the Commissioners first criticized the hearing examiner for his handling of some of the testimony, stating that "[f]rom the initial decision it appears, that the examiner ignored some of this testimony and some of it was given little or no weight because the examiner either questioned the credibility of the witness or considered their testimony hearsay." (Opinion of the Commission at 4.) The Commissioners themselves then proceeded to ignore all testimony completely: "[I]n view of our decision to independently analyze—and without assistance from consumer or other witnesses—the challenged advertisements and their impact . . . *it becomes unnecessary to review the testimony of these expert and consumer witnesses.*" (*Id.* at 6; emphasis added.) Later in the opinion they again noted that "for the reasons stated above *the Commission will rely on its own reading and study of the*

advertisements to determine whether the questioned representation has the capacity to deceive." (*Id.* at 13; emphasis added.) The hearing examiner in a Federal Trade Commission proceeding has both the right and the duty to make determinations concerning the credibility of witnesses and the exclusion of hearsay evidence; while the Commissioners may review those determinations on appeal, in light of the record, they may not choose to ignore completely the testimony adduced at the hearing.[3]

A further example of the Commissioners' determination to make a de novo review of the advertisements rather than considering the record as developed during the hearing is the statement that:

> A review of the examiner's initial decision has persuaded the members of the Commission *to examine firsthand and independently* the challenged representations contained in respondents' advertisements rather than relying on the analysis thereof contained in the initial decision.[4]

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[3] It is clear that what the Commissioners did here was to review selected parts of the record (the advertisements) while ignoring other matters of record (the testimony of consumer and expert witnesses). We have noted elsewhere in this opinion (see text at 9-11 *infra*) that a reviewing court is required to review the entire record on appeal in determining whether the substantial evidence rule is met; we think that requirement is equally applicable to an agency reviewing the findings of its trial examiner. While the Commissioners may arrive at a different conclusion from the examiner and may thus overturn his decision, they may not do so in conformity with the concept of due process unless they have at their disposal as full an appreciation of all of the evidence as the person whose decision they are overturning.

[4] Counsel for the respondent has attempted to refute the allegation that the Commission relied on its own reading of the advertisements as the basis for its decision by arguing that "[i]n face of the Commission's pronouncement that it did re-

(Opinion of the Commission at 4; emphasis added.) Not only do we find this conduct on the part of the Commissioners a violation of their own rules and hence of due process, but we also seriously question their ability to make the determination called for without the aid of the testimony in the record. It should be noted that the advertisements here in question are directed at a specific, narrow part of the public—teenage girls who are recent high school graduates and who do not intend to pursue their formal education in college. While it may be true that some advertisements are so glaringly misleading that anyone can recognize that fact, we think it could only benefit the ultimate determination if the Commissioners had before them the testimony both of experts on youth and of teenage girls themselves, in addition to their own reading of the statements alleged to be misleading. While they might initially decide that a given statement had the capacity to mislead, perhaps testimony of experts and consumers would reveal

view the entire record . . . , Cinderella's claim that the Commission . . . arbitrarily passed over the consumer and expert testimony . . . is plainly without merit." Brief for Respondent at 16. The statement on page two of the Findings of Fact that the entire record had been reviewed in making the determination to vacate and set aside the initial decision is not sufficient to validate the procedure adopted here. It is not the Commission's "pronouncement" that is important to us; rather, it is what the Commission in fact did. At the one point at which the Commission referred to the record in this regard in their opinion, it was to agree with the hearing examiner's dismissal of one of the charges by stating that "[a] careful review of the record indicates that the evidence and testimony contained therein is insufficient to support this charge." Opinion of the Commission at 26. These two references are scant evidence that petitioner's attack on procedural grounds is "plainly without merit," especially in view of the repeated statements of the Commission that it was making a de novo evaluation of the advertisements without reference to the evidence.

that the group at which the statements were directed was in fact more knowledgeable and sophisticated than the Commissioners had originally anticipated. In any event, we think it can only help, and certainly it will not hurt, to have the testimony before the reviewing Commissioners as well as their own reading of the advertisements.

As authority for the proposition that they could properly ignore the record and make a de novo determination of the capacity of the statement to mislead, the Commissioners state only that "[t]he Commission's authority to predicate a finding of deception on its own examination and study is too well settled to require further comment." (Opinion of the Commission at 4.) The Commission's counsel reiterated this position on appeal, stating in the brief that:

> The Commission, as stated in its opinion . . . , *evaluated Cinderella's advertising entirely on the basis of its own study of the material. It found no need to resolve the conflicting expert and consumer testimony in the record* bearing upon the meaning of the advertisements.

(Brief for the Respondents at 14; emphasis added.) The brief further states that "[t]he law is too well-settled to admit of any doubt that the meaning of advertisements and their tendency or capacity to deceive are questions of fact to be determined by the Commission, whose determination should be upheld unless clearly wrong." (*Id.*)

On its face this statement is true—it is for the Federal Trade Commission to resolve such questions of fact. However, a distinction must be drawn between the "Commission," meaning the entire Federal Trade Commission, including the Commissioners, hearing examiners, staff, etc., and the "Commissioners," who are of course the five Federal Trade Commissioners. It is customary in common parlance, and occasionally even in court opinions, to use the word "Commission" to mean both the broader term and the more restricted group at the top, which would be more

accurately termed the "Commissioners." Thus the cases cited by the Commission in the statement that the "law is too well settled to admit of any doubt" are clearly inapposite, for their holdings relate to the entire "Commission," not to the five "Commissioners" sitting as a reviewing body. In the leading case in this jurisdiction we stated:

> The Commission here has determined that the use of the term "manufacturer's list price" represents to the public that that was the price at which the product was usually and customarily sold by other stores in the area. This determination was within its power, unless it was "arbitrary or clearly wrong." *We cannot say that it was, particularly in view of the consumers' testimony adduced at the hearing.*

Giant Food Inc. v. FTC, 116 U.S.App.D.C. 227, 231-32, 322 F.2d 977, 981-82 (1963), *cert. dismissed*, 376 U.S. 967 (1964) (emphasis added). From this and other statements of the court in the *Giant Food* case it is quite clear that the use of the words "the Commission" related to the Federal Trade Commission, not to the Federal Trade Commissioners sitting in review of an initial decision. It is therefore not appropriate to say that the court in that case upheld the power of the five Commissioners to review the challenged advertisements de novo, making an independent judgment concerning their capacity to deceive and ignoring the evidence adduced at a lengthy hearing.[5] Counsel for the Com-

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[5] A review of the other cases cited by the Commission reveals that in each the court in question referred to the Commission and its integral parts as an entire body in upholding the proposition that the meaning of advertisements and their capacity or tendency to deceive are questions of fact for the Commission to decide unless clearly erroneous; in each there was a review of the evidence in the record. *See* Stauffer Laboratories, Inc. v. FTC, 343 F.2d 75, 79 (9th Cir. 1965); Bakers Franchise Corp. v. FTC, 302 F.2d 258, 261 (3d Cir. 1962); Exposition Press, Inc. v. FTC, 295 F.2d 869, 872 (2d Cir. 1961), *cert. denied*, 370 U.S. 917 (1962); E. F. Drew & Co. v.

mission have therefore seriously misread the cases which they have cited. We are unable to find any authority for their proposition that a sixteen-day hearing may be completely ignored if the Commissioners are dissatisfied with the result reached by their hearing examiner. In fact, language in an opinion which the Commission cites cuts decidedly the other way:

> This finding [that advertising tended to deceive] was amply supported by *evidence adduced in the proceedings before the Commission* . . . . The applicable section of the Act provides . . . that upon a review of this kind "[t]he findings of the Commission as to the facts, *if supported by evidence*, shall be conclusive."

Stauffer Laboratories, Inc. v. FTC, 343 F.2d 75, 79 (9th Cir. 1965) (emphasis added).

There is a reason for the procedures set forth in the rules and regulations promulgated under the Federal Trade Commission Act. The procedures which have been established are designed to provide for proceedings in which both the Commission and the responding party have a fair and equal opportunity to present exhibits and witnesses designed to establish the legitimacy of their argument. The regulations are drawn so as to require reliance on that evidence by the hearing examiner.[6] We think it as prepos-

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FTC, 235 F.2d 735, 741 (2d Cir. 1956), *cert. denied*, 352 U.S. 969 (1957); Rhodes Pharmacal Co. v. FTC, 208 F.2d 382, 387 (7th Cir. 1953), *rev'd in part on other grounds*, 348 U.S. 940 (1955); *cf.* FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385-86 (1965); Carter Products, Inc. v. FTC, 323 F.2d 523, 528 (5th Cir. 1963).

[6] 16 C.F.R. § 3.51(b) (1969) (emphasis added):

> The initial decision shall include a statement of (1) findings . . . and (2) an appropriate rule or order. *The initial decision shall be based upon a consideration of the whole record and supported by reliable, probative, and substantial evidence.*

terous for the Commission to claim a right to ignore that evidence and, with more daring than prudence, to decide a case de novo as it would be for this court to claim a right to ignore the findings of fact and conclusions of law of a district court in a proceeding here, substituting the judgment of this court on a cold record for that of the finder of the fact below.

Counsel for the Commission referred at oral argument to the Supreme Court's decision in *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358 (1955), in an effort to convince the court that the Commission could make an independent review of the advertisements without regard to the evidence adduced at the hearing. In that case the Court said:

> The Court of Appeals' conclusion of error as to evasiveness relies largely on its understanding that the Examiner's findings based on demeanor of a witness are not to be overruled by a Board without a "very substantial preponderance in the testimony as recorded". . . . We think this attitude goes too far. It seems to adopt for examiners of administrative agencies the "clearly erroneous" rule of the Fed. Rules Civ. Proc., 52(a), applicable to courts.

358 U.S. at 364. Of course, we agree with that statement; we do not mean by our previous statement that the same rule applies to both courts and administrative agencies. The Court went on to cite the *Universal Camera* opinion for the proposition that "'[t]he responsibility for decision . . . placed on the Board is wholly inconsistent with the notion that it has power to reverse an examiner's findings only when they are "clearly erroneous."'" *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 492 (1951). The determination we make here is not contrary to these statements by the Supreme Court; we do not say that the Commission must find an examiner's findings of fact and conclusions of law "clearly erroneous" before overturning an initial decision, but we do say that it must consider that decision and

the evidence in the record upon which it is based, rather than dismissing the proceedings at the hearing out of hand. To hold otherwise would put us in an impossible situation: the substantial evidence test as explained in *Universal Camera* requires us to review all of the record in determining whether the agency's decision is supported by substantial evidence, yet the Commission contends that it has the power to make an independent determination without reference to the evidence. We hardly think it permissible for the Commission to draw such independent conclusions, while ignoring the record and consequently converting the entire hearing proceeding into a meaningless exercise, leaving it for the court to review the record to find whether there is evidence to support those conclusions.

The procedures for decision on appeal have been established for the Federal Trade Commission as follows:

> Upon appeal from or review of an initial decision, the Commission *will consider* such parts of the record as are cited or as may be necessary to resolve the issues presented and, *in addition*, will, to the extent necessary or desirable, exercise all the power which it could have exercised *it* it had made the initial decision.

16 C.F.R. § 3.54(a) (1969) (emphasis added). Surely this language makes it clear that the five Commissioners, in reviewing an initial decision, are not to speak as *verbum regis*, but must consider the evidence adduced at the hearing. The regulation makes it clear that the Commissioners *will* consider the record, and that they may *additionally* exercise the powers they *could* have exercised had they made the initial decision. We do not hold that the Commissioners could not have reviewed the advertisements independently if they had been responsible for the decision from the outset; but when a proceeding which involves sixteen days, 1,810 pages of testimony, fifty-two witnesses, and 247 exhibits, has been established, the Commissioners are not free to boil over in aggression and completely dismiss those proceedings either because they are dissatisfied with the out-

come, or for any other reason. Such procedure is rooted in nothing and places the Commission in the position of being both the instrument and the musician at the same time. The result, legally, is a ragged and confusing mosaic defying the very archetype of due process, abandoning the merit in hearings of the power of persuasion for the persuasion of power and thereby producing a self-justifying system that makes fairness not really the controling factor in practice that it seems in metaphor.

The regulations establish the procedure the Commission is to follow:

> In rendering its decision [on appeal or review], the Commission *will adopt, modify, or set aside the findings, conclusions, and rule or order contained in the initial decision, and will include in the decision a statement of the reasons or basis for its action* . . . .

16 C.F.R. § 3.54(b) (1969) (emphasis added). This gives the reviewing Commissioners great latitude to disagree with their hearing examiner;[7] it does not, however, give them the option of completely ignoring the testimony of many witnesses and the findings of the examiner on premises which are legally evanescent. If they choose to modify or set aside his conclusions they must state that they are doing so and they must give reasons for so doing. To hold otherwise is to ignore the objectives of adversary proceedings before the Commission. Only if such rules are carefully adhered to can a reviewing court properly analyze the action taken by the Commission; only then can the wheat of meaningful agency action be separated from the chaff of arbitrary and capricious conduct. The Commissioners may not turn away in haughty administrative aloofness from the entire body of law governing their procedures.[8]

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[7] *See* Sign & Pictorial Union Local 1175 v. NLRB, No. 22,274 (D.C. Cir. Sept. 23, 1969) (slip op. at 10-11).

[8] Our remand of this proceeding of course is not meant to

II. Disqualification of Chairman Dixon

An additional ground which requires remand of these proceedings—and which would have required reversal even in the absence of the above-described procedural irregularities—is participation in the proceedings by the then Chairman of the Federal Trade Commission, Paul Rand Dixon.

Notice that the hearing examiner's dismissal of all charges would be appealed was filed by the Commission staff on February 1, 1968 (Brief for Petitioners at 18). On March 12, 1968, this court's decision was handed down in a prior appeal arising from this same complaint, in which we upheld the Commission's issuance of press releases which called attention to the pending proceedings.[9] Then, on March 15, 1968, while the appeal from the examiner's decision was pending before him, Chairman Dixon made a speech before the Government Relations Workshop of the National Newspaper Association in which he stated:

> What kind of vigor can a reputable newspaper exhibit? The quick answer, of course, pertains to its editorial policy, its willingness to present the news without bias. However, that is only half the coin. How about ethics on the business side of running a paper? What standards are maintained on advertising acceptance? What would be the attitude toward accepting good money

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reflect any intimation that this court has passed on the merits of the case; such a determination will not be required until such time as the Commission has concluded on the basis of the complete record whether or not Cinderella acted illegally in making the challenged statements in the form of advertisements. Our concern is not that Cinderella be absolved but rather that it be provided due process of law in the manner in which its guilt or innocence is ascertained.

[9] FTC v. Cinderella Career & Finishing Schools, Inc., U.S.App.D.C. ——, 404 F.2d 1308 (1968).

> for advertising by a merchant who conducts a "going out of business" sale every five months? *What about carrying ads that offer college educations in five weeks*, fortunes by raising mushrooms in the basement, getting rid of pimples with a magic lotion, *or becoming an airline's hostess by attending a charm school?* Or, to raise the target a bit, how many newspapers would hesitate to accept an ad promising an unqualified guarantee for a product when the guarantee is subject to many limitations? Without belaboring the point, I'm sure you're aware that advertising acceptance standards could stand more tightening by many newspapers. *Granted that newspapers are not in the advertising policing business, their advertising managers are savvy enough to smell deception when the odor is strong enough.* And it is in the public interest, as well as their own, that their sensory organs become more discriminating. The Federal Trade Commission, even where it has jurisdiction, could not protect the public as quickly.

(App. 134; emphasis added.) It requires no superior olfactory powers to recognize that the danger of unfairness through prejudgment is not diminished by a cloak of self-righteousness. We have no concern for or interest in the public statements of government officers, but we are charged with the responsibility of making certain that the image of the administrative process is not transformed from a Rubens to a Modigliani.

We indicated in our earlier opinion in this case that "there is in fact and law authority in the Commission, acting in the public interest, to alert the public to *suspected violations* of the law by *factual press releases* whenever the Commission shall have reason to believe that a respondent is engaged in activities made unlawful by the Act . . . ." *FTC v. Cinderella Career & Finishing Schools, Inc.*, —— U.S.App.D.C. ——, ——, 404 F.2d 1308, 1314 (1968) (emphasis added). This does not give individual Commissioners license to prejudge cases or to make speeches which give

the appearance that the case has been prejudged.[10] Conduct such as this may have the effect of entrenching a Commissioner in a position which he has publically stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record. There is a marked difference between the issuance of a press release which states that the Commission has filed a complaint because it has "reason to believe" that there have been violations, and statements by a Commissioner after an appeal has been filed which give the appearance that he has already prejudged the case and that the ultimate determination of the merits will move in predestined grooves. While these two situations—Commission press releases and a Commissioner's pre-decision public statements—are similar in appearance, they are obviously of a different order of merit.

As we noted in our earlier opinion, Congress has specifically vested the administrative agencies both with the "power to act in an accusatory capacity" and with the "responsibility of ultimately determining the merits of the charges so presented." —— U.S.App.D.C. at ——, 404 F.2d at 1315.

Chairman Dixon, sensitive to theory but insensitive to reality, made the following statement in declining to recuse himself from this case after petitioners requested that he withdraw:

> As . . . I have stated . . . this principle "is not a rigid command of the law, compelling disqualification for trifling causes, but a consideration addressed to the

[10] In its brief the respondent has attempted to demonstrate that Chairman Dixon's speech made reference not to the currently pending case, but rather to two cases which had been decided by the Commission in 1961. In light of the timing of the speech in relation to the proceedings herein, we think the reasonable inferrence a disinterested observer would give these remarks would connect them inextricably with this case.

> discretion and sound judgment of the administrator himself in determining whether, irrespective of the law's requirements, he should disqualify himself."

(App. 143.) To this tenet of self-appraisal we apply Lord Macaulay's evaluation more than 100 years ago of our American government: "It has one drawback—it is all sail and no anchor." We find it hard to believe that former Chairman Dixon is so indifferent to the dictates of the Courts of Appeals that he has chosen once again to put his personal determination of what the law requires ahead of what the courts have time and again told him the law requires. If this is a question of "discretion and judgment," Commissioner Dixon has exercised questionable discretion and very poor judgment indeed, in directing his shafts and squibs at a case awaiting his official action. We can use his own words in telling Commissioner Dixon that he has acted "irrespective of the law's requirements"; we will spell out for him once again, avoiding tired cliche and weary generalization, in no uncertain terms, exactly what those requirements are, in the fervent hope that this will be the last time we have to travel this wearisome road.

The test for disqualification has been succintly stated as being whether "a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir.), *cert. denied*, 361 U.S. 896 (1959).

That test was cited with approval by this court in *Texaco, Inc. v. FTC*, 118 U.S.App.D.C. 366, 336 F.2d 754 (1964), *vacated and remanded on other grounds*, 381 U.S. 739 (1965). In that case Chairman Dixon made a speech before the National Congress of Petroleum Retailers, Inc. while a case against Texaco was pending before the examiner on remand. After restating the test for disqualification, this court said:

> [A] disinterested reader of Chairman Dixon's speech

> could hardly fail to conclude that he had in some measure decided in advance that Texaco had violated the Act.

118 U.S.App.D.C. at 372, 336 F.2d at 760. We further stated that such an administrative hearing "must be attended, not only with every element of fairness but with the very appearance of complete fairness," citing *Amos Treat & Co. v. SEC*, 113 U.S.App.D.C. 100, 107, 306 F.2d 260, 267 (1962). We therefore concluded that Chairman Dixon's participation in the *Texaco* case amounted to a denial of due process.

After our decision in *Texaco* the United States Court of Appeals for the Sixth Circuit was required to reverse a decision of the FTC because Chairman Dixon refused to recuse himself from the case *even though he had served as Chief Counsel and Staff Director* to the Senate Subcommittee which made the initial investigation into the production and sale of the "wonder drug" tetracycline. *American Cyanamid Co. v. FTC*, 363 F.2d 757 (1966). Incredible though it may seem, the court was compelled to note in that case that:

> [T]he Commission is a fact-finding body. As Chairman, Mr. Dixon sat with the other members as triers of the facts and *joined in making the factual determination* upon which the order of the Commission is based. *As counsel for the Senate Subcommittee, he had investigated and developed many of these same facts.*

363 F.2d at 767 (emphasis added). It is appalling to witness such insensitivity to the requirements of due process; it is even more remarkable to find ourselves once again confronted with a situation in which Mr. Dixon, pouncing on the most convenient victim, has determined either to distort the holdings in the cited cases beyond all reasonable interpretation or to ignore them altogether. We are constrained to this harshness of language because of Mr. Dixon's flagrant disregard of prior decisions.

The rationale for remanding the case despite the fact

that former Chairman Dixon's vote was not necessary for a majority is well established:

> Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured.

Berkshire Employees Ass'n of Berkshire Knitting Mills v. NLRB, 121 F.2d 235, 239 (3d Cir. 1941). This rationale was cited with approval in the *American Cyanamid* opinion; we adopt the position of our sister circuits on this point.

III. Conclusion

For the reasons set forth above we vacate the order of the Commission and remand with instructions that the Commissioners consider the record and evidence in reviewing the initial decision, without the participation of Commissioner Dixon.

Vacated and remanded.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 379

ALL-STATE INDUSTRIES, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1–A5) is reported at 423 F. 2d 423. The order and opinion of the Federal Trade Commission denying petitioners' motion to dismiss (J.A. 27–33),[1] the initial decision and order of the hearing examiner (J.A. 117–131), and the final order and opinion of the Commission (J.A. 138–153) are not officially reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B1) was entered on April 13, 1970. The petition for a writ of

[1] All "J.A." references are to the joint appendix before the court of appeals.

401-087—70

certiorari was filed on July 11, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission's response to a Congressional inquiry disqualified it from adjudicating its unfair practices complaint against petitioners.

2. Whether, on the facts of this case, petitioners' failure to advise credit customers that their conditional sales contracts and promissory notes would be transferred to third parties and the possible consequences thereof, is a deceptive practice.

STATUTES INVOLVED

Section 5(a) of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45(a), provides in part:

> (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * * *
>
> (6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * *, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

Section 6 of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46, provides in part:

> That the Commission shall also have power—
>
> * * * * *
>
> (f) To make public from time to time such portions of the information obtained by it here-

under, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

STATEMENT

The Federal Trade Commission issued a complaint in June 1967 charging petitioners with making misrepresentations and using deceptive practices as part of a "bait and switch" scheme for selling residential aluminum siding, storm windows and storm doors, and other home improvement products (J.A. 13–14). The complaint alleged, *inter alia*, that in a substantial number of cases petitioners failed to advise credit purchasers that their conditional sales contracts and promissory notes would be negotiated or assigned to third parties to whom they would then be obligated for payment and against whom they might not be able to assert their claims under the purchase contracts (J.A. 9). The complaint explicitly stated that the Commission was taking official notice of the materiality of the failure to disclose (*ibid.*).

In February 1968, petitioners moved to dismiss the proceedings, relying in part upon alleged Commission prejudgment of the case as reflected in a letter signed by its then Chairman, Paul Rand Dixon (Pet. App. C1–C12). The letter was addressed to Senator Magnuson, as Chairman of the Senate Committee on Commerce, and was in response to the Senator's earlier

inquiry "requesting an outline of the Commission's current program in the area of home improvement frauds together with suggestions for additional legislation to improve the enforcement program in this field" (J.A. 29). The lengthy letter described the home improvement industry and some of the practices and artifices employed by the less scrupulous firms in the market (Pet. App. C1–C4). The letter further described the Commission's activities in the field and made recommendations for appropriate legislation (Pet. App. C4–C12).

In claiming that the Commission's response summarizing the sharp practices of certain "fringe operators" evidenced prejudgment of their case, petitioners focused upon the letter's statement that "generally speaking, these firms operate through a program of offering phony bargains, easy credit and exaggerated performance claims" (J.A. 17; Pet. App. C2). They also contended that the letter contained a detailed restatement of the allegations in the instant complaint, and noted the subsequent reference to two cases "presently being litigated" (*ibid.*). In a separate written opinion, the Commission denied prejudgment of either the facts or issues in the proceeding and refused to disqualify itself (J.A. 28–33).

The hearing examiner found petitioners to be engaged in "bait and switch" sales activities, but, *inter alia*, rejected the claim that failure to advise credit purchasers concerning the transfer of credit instruments and the possible consequences thereof was deceptive (J.A. 117–130). The Commission reversed the

hearing examiner, in part, finding the failure to disclose to be deceptive (J.A. 141–153). The latter finding was premised upon the practice's inherent unfairness and the Commission's official notice of facts demonstrating its capacity to deceive (J.A. 148–153).

The court of appeals unanimously affirmed the Commission's cease and desist order.

ARGUMENT

The issues presented are not substantial, were correctly decided below, and do not warrant review by this Court.

1. Congress has authorized the Federal Trade Commission "to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation". Federal Trade Commission Act, § 6(f), 38 Stat. 721, 15 U.S.C. 46(f). The Commission's letter to Senator Magnuson was written pursuant to this authority and reflected no prejudgment of the case. The letter was phrased in general terms and described a broad array of sharp practices employed by "fringe operators" in the home improvement field. That it is a description of fraudulent practices in the business, not a paraphrase of the complaint in this particular case, is readily apparent. As this Court stated in a similar context, "[i]f the Commission's opinions expressed in congressionally required reports would bar its members from acting in unfair trade proceedings, it would appear that opinions expressed in the first basing point unfair trade proceeding would similarly

disqualify them from ever passing on another." *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 702. That proposition was rejected there and must also be rejected here.

Contrary to petitioners' suggestion (Pet. 5), there is no conflict with *Cinderella Career and Finishing Schools, Inc.* v. *Federal Trade Commission*, 425 F. 2d 583 (C.A. D.C.). That case does not hold that public reference to any pending case requires disqualification, but turns rather upon a case-by-case factual test: "[W]hether] a disinterested observer may conclude that the agency has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it" (Pet. App. D16). See *American Cyanamid Co.* v. *Federal Trade Commission*, 363 F. 2d 757, 763–768 (C.A. 6); *Texaco, Inc.* v. *Federal Trade Commission*, 336 F. 2d 754, 759–760 (C.A. D.C.), *vacated and remanded on other grounds*, 381 U.S. 739; *Amos Treat & Co.* v. *Securities and Exchange Commission*, 306 F. 2d 260, 267 (C.A. D.C.); *Gilligan, Will & Co.* v. *Securities and Exchange Commission*, 267 F. 2d 461, 468–469 (C.A. 2), certiorari denied, 361 U.S. 896. The court below applied this test but concluded on the facts that no prejudgment had been made. Moreover, in the discharge of its responsibilities to the public and Congress, an administrative agency may publicly state its general views on subjects within its competence. *United States* v. *Morgan*, 313 U.S. 409, 421. Nothing in the record here refutes the presumption that the Commissioners are "men of conscience and intellectual discipline, capable of judging a particular controversy fairly on

the basis of its own circumstances." *United States* v. *Morgan, supra* at 421.

2. Petitioners' contention that the Commission exceeded its powers in ordering disclosure to petitioners' customers that financing documents might be assigned to third parties is unfounded. Section 5 of the Federal Trade Commission Act is "* * * a broad delegation of power * * * to determine whether a method of competition or the act or practice complained of is unfair. The Congress intentionally left development of the term 'unfair' to the Commission rather than attempting to define 'the many and variable unfair practices which prevail in commerce. * * *' " *Atlantic Refining Co.* v. *Federal Trade Commission*, 381 U.S. 357, 367; *Federal Trade Commission* v. *Texaco*, 393 U.S. 223, 226; *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 720. Furthermore, "* * * when the Commission finds deception it is also authorized, within the bounds of reason, to infer that the deception will constitute a material factor in a purchaser's decision to buy." *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392. A tendency or capacity to deceive is enough. *Portwood* v. *Federal Trade Commission*, 418 F. 2d 419, 421–422 (C.A. 10); *Montgomery Ward & Co.* v. *Federal Trade Commission*, 379 F. 2d 666, 670–671 (C.A. 7); *Double Eagle Lubricants, Inc.* v. *Federal Trade Commission*, 360 F. 2d 268 (C.A. 10).

The Commission found the petitioners' practice of assigning financing documents, without first informing credit purchasers of that fact and the possible consequences thereof, to be an inherently unfair trade

practice because the average consumer is unaware that he may thereby lose the threat of nonpayment as a lever to enforce his contract rights (J.A. 148–152). This determination was supported by experience gained in numerous investigations and more than a dozen cases (J.A. 152–153), which demonstrated that consumers are in fact deceived by this practice (J.A. 149–151, n. 17 and 21). Although petitioners were duly notified of the facts officially noticed (J.A. 9), they made no attempt to demonstrate the contrary. Since the findings of deception are warranted by the record and have a reasonable basis in law (*Atlantic Refining Co.* v. *Federal Trade Commission*, *supra* at 367; *Labor Board* v. *Hearst Publications, Inc.*, 322 U.S. 111, 131), there is no basis for further review.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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